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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 829

GIUSEPPE BOLOGNA,
*Appellant*

vs.

HAZEL MORRISSEY,
*Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

## JURISDICTIONAL STATEMENT

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No.

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*Appellant*

vs.

HAZEL MORRISSEY,
*Appellee*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

## JURISDICTIONAL STATEMENT

Appellant appeals from the judgment of the Supreme Court of the State of Mississippi entered on November 28, 1960, overruling on its merits the suggestion of error (petition for rehearing) filed to the opinion of said Supreme Court which was handed down on October 10, 1960, and the judgment thereon based reversing decree of the Chancery Court of Warren County, Mississippi, and entering judgment in favor of Appellee; and Appellant submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

## OPINIONS BELOW

The opinion of the Supreme Court of the State of Mississippi is reported 123 So.2d 537. No opinion was rendered in connection with the order of November 28, 1960, overruling this Appellant's suggestion of error. Hereto is attached as Appendix "A" a copy of the opinion of the Mississippi Supreme Court, including the dissenting opinion.

## JURISDICTION

The Supreme Court of Mississippi on October 10, 1960, filed its opinion giving extraterritorial force to a Mississippi prohibition statute whereby to absolutely invalidate a Louisiana contract relating to the purchase of liquors, with the effect of exonerating from debt the Mississippi citizen who had bought said liquors in Louisiana and there given his checks to the Louisiana wholesaler (this Appellant) therefor. The constitutional questions had been raised from the outset and throughout, and, following the decision of the Supreme Court of Mississippi giving extraterritorial effect to this Mississippi statute, Appellant filed a timely suggestion of error, specifically showing that thus upholding this Mississippi statute, under the facts and circumstances at bar, was repugnant to the Federal constitution. Nevertheless Appellant's suggestion of error was overruled by a final order entered by the Supreme Court of Mississippi on November 28, 1960, and notice of appeal was filed in that Court on February 6, 1961. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review

the judgment on direct appeal in this case: *Home Ins. Co. v. Dick* (1930), 50 S. Ct. 338, 281 U.S. 397, 74 L. Ed. 926; *Hartford A. & I. Co. v. Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928; *New York Life Ins. Co. v. Head* (1914), 34 S. Ct. 879, 234 U.S. 149, 58 L. Ed. 1259; *Supreme Council of Royal Arcanum v. Green* (1915), 35 S. Ct. 724, 237 U.S. 531, 59 L. Ed. 1089; *Mobile & Ohio R. R. Co. et al. v. State of Tenn.*, 14 S. Ct. 968, 153 U.S. 486, 38 L. Ed. 793; *A. A. McCullough v. Commonwealth of Va.*, 172 U.S. 102, 19 S. Ct. 134, 43 L. Ed. 382; *Broderick v. Rosner*, 294 U.S. 629, 79 L. Ed. 1100, 55 S. Ct. 589; *Murray v. City Council of Charleston*, 6 Otto 432, 96 U.S. 432, 24 L. Ed. 760.

## QUESTIONS PRESENTED

A Mississippi "bootlegger" acquired intoxicating liquor in Louisiana from Appellant, a liquor merchant there lawfully licensed to sell liquors at wholesale. The Mississippian issued his checks for said liquor. These checks were dishonored. Later the Mississippian gave to Appellant certain deeds of trust on Mississippi lands. Following nonpayment, these deeds of trust were foreclosed and the record titles vested in Appellant. In a suit to set aside the deeds of trust and deeds, the Supreme Court of Mississippi applied a Mississippi statute to the original dealings had in Louisiana and, giving extraterritorial effect to this Mississippi statute, held that there was no valid debt incurred in Louisiana and that, since the original debt was invalid under this Mississippi statute, the deeds of trust later given as security therefor were consequently invalid. As thus construed, upheld and given extraterritorial effect, is not said Mississippi statute void, being repugnant to the Constitution of the United States of America, especially in that:

(a) The Supreme Court of Mississippi could not, based upon this Mississippi statute, declare invalid obligations which were governed by and valid under the laws of Louisiana, but to the contrary said Mississippi Supreme Court should have, under the full faith and credit clause (Article IV, Section 1), respected and applied the laws of Louisiana;

(b) The giving of such extraterritorial effect to said Section 2612, Mississippi Code of 1942, violates the due process clause (Amendment XIV) of the Federal Constitution; and

(c) The opinion of said Mississippi State Supreme Court applying Section 2612 of the Mississippi Code to this Louisiana contract and the judgment based thereon results to impair the obligations of that contract in violation of Article I, Section 10, Clause 1 of the Constitution of the United States.

In addition, does not the standing judgment of the Supreme Court of Mississippi result to deny to this Appellant rights guaranteed to him as an individual and citizen of Louisiana under the Federal Constitution, particularly in that (a) a debt incurred and due under the laws of Louisiana was absolutely invalidated and his contractual rights impaired, and (b) the rights guaranteed to him under the Fourteenth Amendment, as a citizen and lawful merchant within the State of Louisiana, were ignored and his properties (the indebtedness admittedly due to him) taken from him without due process of law?

## STATUTES INVOLVED

Section 2612 of the Mississippi Code of 1942 and the following provisions of the Constitution of the United

States, viz.: Article I, Section 10, Clause 1; Article IV, Section 1; and Amendment XIV. Said Section 2612 of the Mississippi Code of 1942 reads as follows:

> "2612. Debt for liquors not collectible.
>
> If any person shall trust or give credit to another for intoxicating liquors, he shall lose the debt, and be forever disabled from recovering the same or any part thereof; and all notes or securities given therefor, under whatever pretense, shall be void." (Vol. 2A Recompiled, p. 376).

## STATEMENT

Appellant, duly licensed under both the laws of Louisiana and the Federal government, is lawfully engaged in Louisiana in the sale of intoxicating liquors at wholesale. The State of Mississippi by statute prohibits the liquor trade, including the possession and sale of intoxicating liquors therein. Nevertheless, citizens of Mississippi, such as Mike Morrissey, openly engage within Mississippi in this prohibited business, reporting their liquor sales to the Mississippi taxing authorities and paying into the State Treasury "black market" and "sales" taxes. In the course of his business, Morrissey would send from Mississippi over to Louisiana and buy intoxicating liquors from Louisiana wholesalers, the Appellant and others.

The indebtedness here involved arose under the following circumstances: Morrissey would send his trucks to Appellant's place of business in Baton Rouge, Louisiana. He would give his truck driver a check to pay for the liquor order. After the check was delivered in payment, the whiskey was loaded by Appellant on Morrissey's truck and the sale in fact completed. The statements delivered by Appellant to Morrissey's truck driver would correctly show

that the sale was made to Morrissey, whose address was in Vicksburg, Mississippi. Owning the product which was placed on his truck, Morrissey had complete control and dominion thereover. This liquor was, however, customarily transported by Morrissey from Appellant's place of business in Louisiana to his own place of business in Mississippi for distribution and resale by Morrissey within Mississippi. A number of Morrissey's checks "bounced". These dishonored checks totaled in excess of $100,000. Morrissey and his wife, Elizabeth Morrissey, determined to voluntarily give to Appellant notes secured by Deeds of Trust on certain lands they owned in Mississippi in exchange for the dishonored checks and to evidence and pay the debt thereby represented. After the indebtedness as thus evidenced and secured was long past due and unpaid, foreclosure proceedings were instituted *in pais* by Appellant as by the deeds of trust authorized. The Morrisseys then undertook in the Mississippi courts to enjoin and, posting bond, did temporarily enjoin these foreclosures. These temporary injunctions were, upon the trial, dissolved. The foreclosure proceedings were then reinstituted and regularly pursued to a conclusion. Having been unsuccessful in enjoining the sales, Elizabeth Morrissey joined by her husband, Mike Morrissey, transferred these properties to Mike's sister, Hazel Morrissey, the Appellee here. Then Hazel Morrissey brought this suit to cancel the deeds of trust and trustee's deeds. Appellee's suit was premised on the contention that since the purchase of intoxicating liquors was involved both "said debt and said deed of trust are void and of no effect and are unenforceable in the State of Mississippi' (R. 5-6).

**How the Federal Questions Are Presented**

In addition to fully answering and denying that Appellee was entitled to the relief sought, this Appellant *in limine* interposed the following special plea:

"This Defendant will show that he has been in association with others in the liquor business in Louisiana. The Defendant will show that such business is a legal business recognized by the laws of Louisiana and that in the conduct of said business in connection with his dealings with Mike T. Morrissey, the brother of the Complainant, he was doing that which he had a right under the law to do in the State of Louisiana and that any indebtedness which the said Mike T. Morrissey incurred was a valid, legal and subsisting indebtedness; that the fact that the said Mike T. Morrissey thereafter used the product which the Defendant had lawfully sold to him for an illegal or improper purpose does not infect the transaction from this Defendant's standpoint or the business in which this Defendant was engaged with illegality. This Defendant would show that any contract which he made or indebtedness which was due to him was validly incurred from his standpoint and that said contract should not be impaired and it would do violence to the laws and Constitution of the United States of America for said contract to be impaired and destroyed; and Defendant will further show that it was not the intendment of any statute of the State of Mississippi nor does any statute of the State of Mississippi have application to void or invalidate a contract which was valid where made, nor to operate for the benefit of citizens who are in the business of violating the very laws which they plead as a shield to protect them from the payment of their just debts and debts which were entirely regular and lawful when and where incurred." (R. 56-57).

At the conclusion of a trial upon the merits the Chancellor dismissed Appellee's suit (R. 379-380). Answering the appeal which Appellee then prosecuted to the State Supreme Court, Appellant (Bologna) devoted Section C of his brief to showing: "The Provisions of Section 2612, Mississippi Code of 1942, Have No Extraterritorial Effect;

and an Indebtedness Validly Incurred in Louisiana is not Within the Terms of Said Section 2612" (R. 389). Appellant (Bologna) there argued and cited the authorities to show that, under the Federal Constitution, this Mississippi statute could have no extraterritorial effect, referring the Mississippi appellate court to such cases as *Hartford A & I. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 78 L. Ed. 1178, and the case of *Home Insurance Co.* v. *Dick*, *supra*, therein cited (R. 390).

The Supreme Court of Mississippi recognized, as by its opinion shown, that "He (Bologna) further set up that Mike T. Morrissey's indebtedness was validly incurred in Louisiana, where the sale of liquor was lawful, and such contract should not be impaired" (R. 402). Otherwise stated, the State Supreme Court showed its recognition that this Appellant was contending that the laws of Louisiana were applicable and full faith and credit had to be given thereto; for the Supreme Court of Mississippi in its opinion stated: "He (Bologna) says also that the indebtedness was incurred in Louisiana, where it could be validly contracted, *and the same must be governed by the laws of that state;*" (R. 403).

After the highest court of Mississippi nevertheless gave extraterritorial effect to Mississippi Section 2612, upholding its validity against the contention that such application was at bar repugnant to the Constitution of the United States, Appellant timely filed a suggestion of error again and specifically urging every contention here asserted and encompassed within the statement of the constitutional questions which are presented by this appeal.[1]

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1. Appellant had pointed out that the laws of Louisiana governed and that the debt was consequently valid. There was really no reason for Appellant to anticipate that the appellate court would apply this Mississippi statute to void this Louisiana

As Appendix "B" Appellant annexes a copy of the order entered by the State Supreme Court based upon its opinion of October 10, 1960. To here show the timely and repeated presentation and argument of these Federal questions before the court below, Appellant has had pertinent portions of his original brief (R. 389-394) and excerpts from his suggestion of error (R. 420-438) included in the record on this appeal; and in amplification hereof Appellant attaches as Appendix "C" hereto these excerpts from his suggestion of error; and then Appellant attaches as Exhibit "D" hereto a copy of the order of the Mississippi Supreme Court of November 28, 1960, showing that the court considered these contentions on the merits and overruled the same (R. 438). In Appendix "C" hereto attached the erroneous factual statements embraced within the opinion of the State Supreme Court are pointed out. As shown in the text on "Supreme Court Practice" by Stern and Gressman (2nd Ed.), p. 101, quoting from *Fiske* v. *Kansas*, 274 U.S. 380, 71 L. Ed. 1108, this Court will review a state court's finding "where a Federal right has been denied as a result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts." See *Sterling* v. *Constantin*, 287 U.S. 378, 77 L. Ed. 375, and

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debt and to thereby impair and destroy the obligations and titles which otherwise were properly based thereon. Under those circumstances, even had not Appellant originally pled and constantly urged the federal constitutional issues, the raising of them for the first time in the petition for rehearing would have been timely. See "Supreme Court Practice" by Stern & Gressman, 2d Ed., pp. 89-90, and the numerous cases cited in the footnote to the text, including *Saunders* v. *Shaw*, 244 U.S. 317, 61 L. Ed. 1163, 37 S. Ct. 638; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358, 367, 77 L. Ed. 360, 368, 53 S. Ct. 145, 85 A.L.R. 254.

*Creswill v. Grand Lodge K of P*, 225 U.S. 246, 56 L. Ed. 1074. However, these erroneous factual statements referred to and quoted in sub. II of Appendix "C" hereto were really deemed immaterial by the State Supreme Court for, as shown by that court's opinion, the fact that the dealings were actually had and the debt was incurred in Louisiana was declared to be of no moment. This is shown by the following extract from the opinion of the state court:

> "In Goodman v. Swett, 108 Miss. 224, 66 So. 535, 536, where the liquors were delivered by the appellants to a common carrier in St. Louis for delivery to the appellee's intestate in this State, and it was contended that Section 2612, supra, had no application for the reason that the debt sued on was contracted in the State of Missouri, the opinion said: 'There is no merit in this contention, for the reason, that this section is not limited in application to debts due for intoxicating liquor sold in the state of Mississippi. It bars all persons from collecting in the courts of this state any debt so contracted.' *Thus the appellee's contention that his debt is valid because it was contracted in Louisiana is untenable.*" (Emphasis supplied).

This proposition was squarely presented to the State Supreme Court as shown R. 391-392 and was extensively reargued as shown in sub. III of Appendix "C". That court nevertheless held that where the debt was incurred was not controlling and gave affirmative relief to the Appellee by invalidating the (Louisiana) debt and, *as the direct consequence*, the security later given therefor and the titles based thereon.

## THE QUESTIONS ARE SUBSTANTIAL

As above shown, a Mississippi statute was applied to impair and to invalidate a Louisiana contract. The effect was not only to take from this Louisiana merchant (Appellant), there lawfully selling intoxicating liquors in accordance with the laws of that state, the right to collect on bad checks given to him by the Mississippi citizen in exchange for his goods but to even invalidate (nullify) the debt itself. Instead of applying the laws of the State of Louisiana there clearly applicable and giving full faith and credit to them, the Mississippi Supreme Court, in a suit brought by a third party, interposed its Section 2612, Mississippi Code of 1942, to the entire trade—to impair the contract and to enable the Mississippi citizen to obtain for free the product which the Louisiana merchant was lawfully privileged to there sell in Louisiana.

Mississippi has laws prohibiting the sale of intoxicating liquors. All of the other 49 states of the Union have laws authorizing but regulating the sales of such intoxicants. The constitutional question is: "Can Mississippi extend its laws on the subject into other states whereby to invalidate trades there made?"

Since our only purpose here is to show that the questions are substantial rather than at this time to demonstrate that the position of the Appellant is correct, we but point out:

1. That at issue is the failure to give full faith and credit to the laws of Louisiana—the place where the contract was made, the goods delivered and the checks in payment (later dishonored) given. If the laws of Louisiana governed, then everyone concedes that this was a lawful trade and that a valid debt existed in favor of the holder

of these dishonored checks who had parted with his merchandise on the faith thereof. The statutes of Louisiana authorizing the dealings there by Appellant are "public acts" which should have been accorded full faith and credit in Mississippi. *Broderick* v. *Rosner*, 294 U.S. 629, 79 L. Ed. 1100, 55 S. Ct. 589. Whether Mississippi had the right to close its courts had the Appellant brought a suit therein to collect the debt is one thing, but here the action was instituted by a third party to have the Mississippi Court declare the whole Louisiana deal to be void. The Mississippi court said:

> "Bologna trusted and gave credit to Mike T. Morrissey for intoxicating liquors. Under the (Mississippi) statute, he lost his debt and is forever disabled from recovering it. The notes and deeds of trust were given for the purpose of securing the debt. Again, the statute makes these securities void."
>
> • • • •
>
> "Under the (Mississippi) statute, Bologna had lost his debt, and his notes and deeds of trust were void. He had nothing. *In law, he was not even a creditor.*"

That, as pointed out *New York Life Ins. Co.* v. *Head*, Missouri (1914), 34 S. Ct. 879, 234 U.S. 149, 58 L. Ed. 1259, cited *supra*:

> "Such question, we think, admits of but one answer, since it would be impossible to permit the statutes of Missouri to operate beyond the jurisdiction of that state and in the state of New York, and there destroy freedom of contract without throwing down the constitutional barriers by which all the states are restricted within the orbits of their lawful authority, and upon the preservation of which the government under the Constitution depends. This is so obviously the necessary result of the Constitution that it has rarely been called in question, and hence authorities directly dealing with it do not abound. The principle,

however, lies at the foundation of the full faith and credit clause and the many rulings which have given effect to that clause."

See also *Supreme Council of Royal Arcanum* v. *Green* (1915), 35 S. Ct. 724, 237 U.S. 531, 59 L. Ed. 1089.

2. That no state legislature could impair the obligation of the contract between the parties is settled. By the same reasoning the judiciary may not project and subsequently apply the provisions of a statute which was not controlling or applicable at the time and place the contract was made. So to do impairs and destroys the contract made by the parties and serves to circumscribe and defeat Article I, Section X, Clause 1 of the Federal Constitution. See *Murray* v. *City Council of Charleston*, 6 Otto 432, 96 U.S. 432, 24 L. Ed. 760, *supra*, and *City of Chicago* v. *Sheldon*, 9 Wall. 50, 76 U.S. 50, 19 L. Ed. 594.

3. That giving extraterritorial effect to the laws of the State of Mississippi violates the due process clause of the Federal Constitution, with the effect of unconstitutionally taking Appellant's property—freeing the taker from obligation to pay therefor. What the Mississippi State court here did was to take the titles which had been vested in Appellant in exchange for his goods and bestow and grant them to a third party, at the suit of that third party, based upon the conclusion that a Mississippi statute should be extended to dealings had in Louisiana and served to nullify obligations incurred in Louisiana. This is certainly contra to *Home Ins. Co.* v. *Dick*, 50 S. Ct. 338, 281 U.S. 397, 74 L. Ed. 926, and *Hartford A. & I. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928.

While Mississippi in its sovereignty is privileged to be and remain the one state in the Union which has laws

which purportedly prohibit the sale of intoxicants therein, we submit that most serious and fundamental constitutional questions arise when Mississippi seeks to extend her laws into other states and to thereby supersede the laws of such other states. When contracts validly made in Louisiana are invalidated by applying and upholding a Mississippi statute against the contention that so to do is repugnant to the Constitution of the United States, we indeed have a substantial question concerning which the right to appeal to this Court was given by the Congress to the aggrieved party.

We submit that we are here as of right and that the questions presented by this appeal are substantial and of public importance.

Respectfully submitted,

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## APPENDIX "A"

## IN THE SUPREME COURT OF MISSISSIPPI

**No. 41,525**

(Reported 123 So.2d 537.)

MISS HAZEL MORRISSEY

vs.

GIUSEPPE BOLOGNA ET AL.

LEE, JUSTICE:

Miss Hazel Morrissey filed her bills in the Chancery Court of Warren County against Giuseppe Bologna and J. G. Sherard, substituted trustee, to cancel certain deeds of trust as clouds on the title of her lands as described therein. At the conclusion of the evidence, the court dismissed the bills without awarding any relief whatever. From the decree entered, Miss Morrissey appealed.

This litigation grew out of the following facts and circumstances: For many years, Mike T. Morrissey had been engaged in the illegal liquor business in this State. He operated in Vicksburg under the firm name of Delta Distributing Company.

Bologna had operated a wholesale liquor business in Baton Rouge, Louisiana, for many years. The sale of liquor in that state was lawful. He had sold whiskey to Morrissey since 1946. Deliveries were made from his place of business to Delta Distributing Company under bills of lading, showing delivery to Vicksburg, Mississippi.

Morrissey got in arrears in his account and Bologna insisted on payment. Mrs. Elizabeth M. Morrissey, the

wife of Mike, owned considerable real estate in Warren County, known as the "Southall Place" and the home in the City of Vicksburg, known as "Grey Oaks." She knew that her husband was engaged in the liquor business, but she herself had no interest therein. To secure the payment of this outstanding debt of her husband to Bologna, Mrs. Morrissey on April 29, 1953, executed and delivered to L. A. Conaty, trustee, a note and deed of trust in the amount of $25,000, payable six months after date, covering the land known as the "Southall Place"; and again on August 5, 1955, she and her husband executed and delivered to L. A. Conaty, trustee, a note and deed of trust in the amount of $75,000, payable in twenty-five equal installments of $3,000 on September 1, 1956, and annually thereafter, covering "Grey Oaks".

Bologna, on February 1, 1958, by separate instruments, substituted J. G. Sherard as trustee in the place of L. A. Conaty in these two deeds of trust; and on February 13, 1958, the substituted trustee began foreclosure proceedings to sell, on March 7, 1958, the properties described in the two deeds of trust.

Mrs. Elizabeth M. Morrissey, on February 19, 1958, filed separate bills against J. G. Sherard in which she alleged that Bologna, the beneficiary in the deeds of trust, knowingly and unlawfully sold intoxicating liquor to her husband, Mike T. Morrissey, and unlawfully exacted the deeds of trust as pretended security for such sales; that such indebtedness arose out of the illegal sale of intoxicating liquor, in violation of the laws of this State; that under Section 2612, Code of 1942, Recompiled, the debt claimed and the notes and pretended security therefor were utterly and completely void; and that Bologna and his substituted trustee were barred from collecting or attempting to collect the same. In her prayer, she sought a temporary

and permanent injunction against the foreclosure and a declaration by the court that the indebtedness and the deeds of trust were void and of no effect, and that the same should be noted on the land records of the county.

Temporary injunctions were issued. Although the substituted trustee, in his answer and pleadings, suggested that Bologna, the beneficiary in the deeds of trust, and Mike T. Morrissey were necessary parties, neither was in fact made a party. After the evidence had been heard, counsel for the defendant Sherard again expressly called to the attention of the court the fact that these two named persons were not parties to the action.

At the conclusion of the evidence, the chancellor made a finding of fact and conclusions of law to the following effect: That Mrs. Morrissey executed the notes and deeds of trust in question of her own accord and without any request or duress from the beneficiary therein; that these instruments evidenced the debts of her husband, Mike T. Morrissey, for whiskey which he purchased in Louisiana and transported to Mississippi for resale; that she knew of her husband's business and the nature of the indebtedness, which she was securing, and that she was assisting her husband in continuing his unlawful business; and that she must be deemed *in pari delicto* and not entitled to the aid or interposition of a court of chancery. For that reason, he left the parties where he found them, dismissed the complaints and dissolved the injunctions, but held that the substituted trustee was not entitled to the statutory damages allowable under Section 1352, Code of 1942, Recompiled.

The defendant Sherard appealed from that portion of the decree denying to him the recovery of damages, made mandatory, as he contended, by the statute; and on that

appeal, in the case entitled *J. G. Sherard, substituted trustee*, v. *Mrs. Elizabeth M. Morrissey*, No. 41,157, this Court affirmed, without an opinion, the action of the trial court in denying the recovery of damages.

Two deeds of trust, which were first liens, were outstanding in favor of the First National Bank & Trust Company of Vicksburg, dated July 30, 1952, and December 15, 1954, against "Southall Place" and "Grey Oaks", respectively. Both deeds of trust were in default and payment had been demanded. On October 7, 1958, for considerations of $3,992.01 and $388.87, and the assumption of the payment of these deeds of trust, Elizabeth M. Morrissey, in the first instance, and she and her husband, Michael T. Morrissey, in the second instance, conveyed and warranted the "Southall Place" and "Grey Oaks", in each instance correctly described, to Hazel Morrissey, a sister of Michael T. Morrissey.

Thereafter, Miss Hazel Morrissey, on October 8, 1958, filed this suit, being two separate bills in which she made both J. G. Sherard, substituted trustee, in the deeds of trust, and Giuseppe Bologna, defendants. She alleged that she was the owner in fee simple of both the "Southall Place" and "Grey Oaks", describing the properties in detail. She charged that her title was derived from the U. S. Government, and by mesne conveyances, through Mrs. Elizabeth M. Morrissey. Copies of her deeds were attached as exhibits to the bills. She averred that the claim of the defendants arose by reason of the deeds of trust of the same Mrs. Elizabeth M. Morrissey, the common source of title, executed by her to them on the same property under the dates of April 29, 1953, and August 5, 1955, as heretofore mentioned. She also charged that the indebtedness for which the deeds of trust had been given as security was incurred by Mike T. Morrissey, hus-

band of Mrs. Elizabeth M. Morrissey, for the purchase of intoxicating liquor from the defendant, Bologna, in violation of the laws of Mississippi, and that the debt and the deeds of trust were void and of no effect and were unenforceable in this State. Inasmuch as the defendants were undertaking to foreclose the deeds of trust and to claim the property, she prayed that the deeds of trust should be declared null and void, and that they should be cancelled and removed as clouds upon her title. When it subsequently appeared that the substituted trustee had consummated the sales on October 9, 1958, the court permitted an amendment of the original bills so as to pray for cancellation also of the trustee's deeds which were executed pursuant thereto.

Sherard, the substituted trustee who was served with process on October 8, 1958, in his answer, reported that he had made the sale on October 9, 1958, and asked to be discharged. The answer of the defendant, Bologna, who was served with process on October 9, 1958, after denying all of the material allegations of the bills, asserted that he had acquired title by virtue of the trustee's deeds, and set up several special pleas in which he maintained the following: (1) That in the previous proceedings, it was adjudicated that Mrs. Elizabeth M. Morrissey, in assisting her husband to continue his illegal business of selling whiskey in Mississippi, had no right in a court of equity to receive any affirmative relief; that the complainant knew and was charged with knowledge thereof; that the conveyance to her was a mere sham or pretense; that she was not a *bona fide* purchaser for value; and that her position was no different from that of Mrs. Elizabeth M. Morrissey. He pled the doctrine of *res judicata;* but said also that if it was not applicable, then he invoked the doctrine of estoppel by judgment. He further set up that

Mike T. Morrissey's indebtedness was validly incurred in Louisiana, where the sale of liquor was lawful, and such contract should not be impaired.

Bologna, called as an adverse witness, admitted that he had been selling liquor to Mike T. Morrissey, operating in the City of Vicksburg as Delta Distributing Company since 1946; that his place of business was in Baton Rouge, Louisiana; that he went back and forth to Vicksburg to confer with Morrissey; that bills of lading for the shipments were made to Vicksburg and the liquor was sold to Morrissey in Mississippi; that he knew that Morrissey was selling this liquor in Mississippi; that the notes and deeds of trust involved in this litigation were given as security for Morrissey's purchases of liquor; that he knew that the sale of liquor in Mississippi was illegal; that he had been in Morrissey's place of business about fifty times, and, on occasions, had made collections while there; and that the notes and deeds of trust were executed and delivered in Mississippi.

The learned chancellor, at the conclusion of the evidence, took the case under advisement for decision in vacation, and, thereafter, without making a finding of fact or conclusion of law, simply entered a decree dismissing the bills at the cost of the complainant. It was from this decree that Miss Morrissey appealed.

The appellee contends that the final decree, which dismissed the complaints filed by the appellant's predecessor, Mrs. Elizabeth M. Morrissey, in the chain of title, are *res judicata* of the present suit; that since Mrs. Elizabeth M. Morrissey was *in pari delicto* with her husband, Miss Hazel succeeded to no better position; and that this same doctrine operates as a bar to any relief to the appellant. He says also that the indebtedness was incurred in Louisiana, where it could be validly contracted, and the same

must be governed by the laws of that state; and that the court should uphold the title vested.

The appellant contends that *res judicata* does not apply; that Hazel was not a party in the first suit; that the decree in the first suit was not rendered on the merits, but because of the disability of Elizabeth to sue on account of the fact that she was *in pari delicto*; that it did not adjudicate title in Bologna nor immunize him from a challenge of his void mortgages; and that no right of property was decided. She further says that she was not *in pari delicto* with him; that she had no connection with Mike T. Morrissey's business nor with the deeds of trust; that she bought no whiskey, sold no whiskey, and gave no security for any whiskey debt; that she had no dealings with Bologna; and that her purchase of the property was a *bona fide* transaction for a valuable consideration.

The essentials to constitute *res judicata* were set forth in *Palmer* v. *Clarksdale Hospital*, 213 Miss. 611, 57 So.2d 476, as follows: "They are (1) identity in the thing sued for; (2) identity in the cause of action; (3) identity of persons and parties to the action; and (4) identity of quality in the persons for or against whom the claim is made." These essentials were reaffirmed in *Rawlings* v. *Royals*, 214 Miss. 335, 58 So.2d 820; *Tobias* v. *Tobias*, 225 Miss. 392, 83 So.2d 638; *The Fidelity and Casualty Company of New York* v. *State Building Commission*, 228 Miss. 37, 87 So.2d 449; *Campbell* v. *Campbell*, 231 Miss. 658, 97 So.2d 527.

In the original proceedings, injunctive relief was sought. In the present case, title to property is involved. In those proceedings, Mrs. Elizabeth M. Morrissey, complainant, and J. G. Sherard, substituted trustee, defendant, were the

sole parties. Even though the answer of the defendant suggested that the beneficiary in the deeds of trust, Bologna, was a necessary and indispensable party, he was not joined. The defendant in that case, again, before the case was decided, called this matter to the attention of the court, and also suggested that Mike T. Morrissey had been shown by the proof to be a necessary party. Yet nothing was done.

Obviously the court was without power to award a decree against Bologna, the alleged creditor and holder of the deeds of trust, when he was not even made a party to the proceedings. The court properly chose not to pass on his rights *in absentia*. Since the proof showed that Mrs. Elizabeth M. Morrissey, with knowledge of her husband's business, executed the notes and deeds of trust, and her act enabled him to continue his illegal operations, the court held that she was *in pari delicto* with her husband, and left the parties where it found them.

The essentials for the application of the doctrine of *res judicata* did not exist in this case. Consequently the present cause is not affected by the original proceeding. This is true because "The general rule is that a judgment rendered because of a defect of parties does not operate to bar a subsequent action. This rule prevails whether the judgment is based upon a want of parties, a misjoinder of parties, a temporary disability of the plaintiff to sue, or a mistake of the plaintiff as to the character or capacity in which he brings suit." 30 Am. Jur., Judgments, Section 350, pp. 392-393.

Section 2612, Code of 1942, Recompiled, provides as follows: "If any person shall trust or give credit to another for intoxicating liquors, *he shall lose the debt, and be forever disabled from recovering the same or any part*

*thereof; and all notes or securities given therefor, under whatever pretense, shall be void.*" (Emphasis supplied).

Bologna trusted and gave credit to Mike T. Morrissey for intoxicating liquors. Under the statute, he lost his debt and is forever disabled from recovering it. The notes and deeds of trust were given for the purpose of securing the debt. Again, the statute makes these securities absolutely void.

The liquors were sent by Bologna from his place of business in Baton Rouge to Morrissey at Vicksburg with bills of lading attached. He knew at the time that such liquors would be retailed by Morrissey in Mississippi in violation of the law. In *Goodman* v. *Swett*, 108 Miss. 224, 66 So. 535, where the liquors were delivered by the appellants to a common carrier in St. Louis for delivery to the appellee's intestate in this State, and it was contended that Section 2612, *supra*, had no application for the reason that the debt sued on was contracted in the State of Missouri, the opinion said: "There is no merit in this contention, for the reason, that this section is not limited in application to debts due for intoxicating liquor sold in the State of Mississippi. It bars all persons from collecting in the courts of this state any debt so contracted." Thus the appellee's contention that his debt is valid because it was contracted in Louisiana is untenable.

Under the statute, Bologna had lost his debt, and his notes and deeds of trust were void. He had nothing. In law, he was not even a creditor. The defense of *pari delicto* is not available to aid him in acquiring property to which he has no right whatever. *In pari delicto* is a corollary of the equitable maxim that he, who comes into equity, must come with clean hands. There are important limitations on this rule. "Even where the contracting parties

are *in pari delicto*, the courts may interfere from motives of public policy. Whenever public policy is considered as advanced by allowing either party to sue for relief against the transaction, then relief is given to him. In pursuance of this principle, and in compliance with the demands of a high public policy, equity *may* aid a party equally guilty with his opponent, not only by canceling and ordering the surrender of an executory agreement, but even by setting aside an executed contract, conveyance, or transfer, and decreeing the recovery back of money paid or property delivered in performance of the agreement. The cases in which this limitation may apply and the affirmative relief may thus be granted include the class of contracts which are intrinsically contrary to public policy—contracts in which the illegality itself consists in their opposition to public policy, and any other species of illegal contracts in which, from their particular circumstances, incidental and collateral motives of public policy require relief." Pomeroy's Equity Jurisprudence, 4th Ed., Section 941, pp. 1998-9.

In the first suit, Mrs. Elizabeth M. Morrissey was adjudged to be *in pari delicto* with her husband. No one is attacking that adjudication. This is not a suit between the husband and wife. It is true that Miss Hazel succeeded to the title of Elizabeth. While she may be *in delicto* on account of that conveyance, she is not *in pari delicto* with anybody. *O'Conner* v. *Ward*, 60 Miss. 1025; *McClellan* v. *McCauley*, 158 Miss. 456, 130 So. 145; *Kidd* v. *Kidd*, 210 Miss. 465, 49 So.2d 824.

The public policy of this State as expressed in Section 2612, *supra*, is registered most strongly against the collection of whiskey debts and the enforcement of liens attaching on that account. Another maxim of equity, namely,

"Equity follows the law", is just as potent as the "clean hands" doctrine.

The following acts had already occurred when the sale was made by the trustee: (1) The bills of complaint charging the deeds of trust to be void, had been filed. (2) Both Sherard, the trustee, and Bologna, the beneficiary, had been served with process in these suits. (3) A representative of the appellant appeared at the place of sale, and fully informed all would-be purchasers of the invalidity of the deeds of trust. In spite of the fact that Bologna had full knowledge that he had lost his debt, and that his deeds of trust were void, and that an issue in this regard had been tendered to the court, he caused his trustee to cry off the property, and he himself was the sole and only pretended purchaser.

On account of this sale, he maintains that his title is good, even though, as a matter of fact, it has been held that a check, in payment of the purchase price of intoxicating liquors, under the statute, is void in the hands of the holder, although it was taken for value and without notice of the character of the consideration. *Elkin-Henson Grain Company* v. *White*, 134 Miss. 202, 98 So. 531. Under the circumstances, Bologna gained nothing from this sale.

Obviously a court of equity, bound to follow the law, should not permit a person to circumvent completely the provisions of the statute and to make a shambles of the law. Indeed Bologna could not, by this foreclosure, have titled vested in himself and thereby enforce an invalid debt, which, by statute, had been lost, and the security for which had become wholly void.

From which it follows that the decree of the chancery court must be reversed, and a decree will be entered in

favor of the appellant, cancelling the deeds of trust and the trustee's deeds thereunder, as clouds on the title of the appellant to the lands in question.

REVERSED AND DECREE HERE FOR APPELLANT.

McGEHEE, C. J., AND HALL, KYLE, HOLMES, ARRINGTON AND McELROY, JJ., CONCUR.

GILLESPIE, JUSTICE, DISSENTING:

I respectfully dissent.

While I have serious doubts whether appellant could maintain her action under the doctrine of estoppel by judgment, or collateral estoppel, my dissent is grounded on the doctrine *in pari delicto*.

Mrs. Elizabeth Morrissey, in effect, contended in the first suit that her act in executing the deeds of trust were in furtherance of an illegal business, that of assisting her husband in the whiskey business, and that the deeds of trust and notes were void. This, indeed, is an uncontroverted fact. The chancellor, in Mrs. Elizabeth Morrissey's suit against the trustee, properly held that Mrs. Elizabeth Morrissey was *in pari delicto* with her husband, Mike Morrissey, and Bologna, and denied to her the right to use the court to extricate herself from the consequences of her own illegal act. She did not appeal. The present suit is brought by Miss Hazel Morrissey, sister of Mike Morrissey, to have the court cancel the notes and deed of trust as clouds on her title which she derived from Mrs. Elizabeth Morrissey, The appellee, Bologna, contends, and I think there was ample testimony to justify the chancellor in finding, that the conveyance from Mrs. Elizabeth Morrissey to appellant, Miss Hazel Morrissey, was nothing more than a sham in an effort on the part of the parties to avoid the legal effect of the adverse judgment rendered

against Mrs. Elizabeth Morrissey in her suit against the trustee, Sherard. That fact alone was enough to justify the lower court in denying relief to appellant, but in this dissent I am relying on the uncontroverted fact that Mrs. Elizabeth Morrissey was *in pari delicto* with the appellee Bologna and was therefore disqualified to call forth the activities of the courts to aid her in escaping the consequences of her own illegal act; and that Hazel succeeded to no greater right or purer position, and likewise is unable to invoke the aid of the courts.

As already indicated, Mrs. Elizabeth Morrissey was *in pari delicto* with appellee. The majority does not contend she was not. The record is conclusive on that question. The previous suit so adjudicated and Mrs. Elizabeth Morrissey did not appeal. The general rule is as stated in 12 Am. Jur., Contracts, Section 212, that "In cases where the parties are *in pari delicto* the law will leave them where it finds them." In 19 Am. Jur., Equity, Section 478, it is stated: "* * * where the wrong of one party equals that of the other, the defendant is in the stronger position * * *. It signifies that in the situation presented neither a court of equity nor a court of law will administer a remedy." Lord Mansfield, in *Holman* v. *Johnson*, 1 Cowper 34, decided in 1775, gives us a better understanding of the basis of the doctrine *in pari delicto* when he said: "* * * the objection that a contract is immoral or illegal as between the plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *Ex dolo malo non oritur actio.* No Court will lend its aid to a

man who founds his cause of action upon an immoral or an illegal act." The words of Lord Mansfield have been paraphrased and approved by this Court in at least two cases: *Western Union Telegraph Co.* v. *McLaurin*, 108 Miss. 273, 66 So. 739; *Downing* v. *City of Jackson*, 199 Miss. 464, 24 So.2d 661.

Before discussing what I understand to be the basis of the majority decision, it should be noted that the opinion says that Miss Hazel Morrissey was not *in pari delicto* with anyone. But we understand the majority to concede that Miss Hazel Morrissey is in no better position than her grantor, Mrs. Elizabeth Morrissey. Both reason and authority place Mrs. Elizabeth Morrissey and Miss Hazel Morrissey in the same position. If one who is *in pari delicto* with another could shuck off the disability attached to his own illegal position by the simple device of conveying or transferring his purported right to another, then the rule denying relief to one *in pari delicto* would be meaningless. In the present case, if appellant, Miss Hazel Morrissey, prevails on this appeal, then Mrs. Elizabeth Morrissey is relieved of a liability on her warranty of approximately $100,000. In 19 Am. Jur., Equity, Section 478, in referring to the rule denying a remedy to one who is *in pari delicto* with another, it is said: "The principle may be invoked not only against a party to the illegal transaction, but also against the heir of a party or anyone claiming under or through a party." Since Miss Hazel Morrissey stands in no better position than her grantor, Mrs. Elizabeth Morrissey, the majority opinion should be examined as if Mrs. Elizabeth Morrissey was seeking to cancel the deeds of trust as clouds on her title.

The opinion says that even where the contracting parties are *in pari delicto*, the courts may interfere from motives public policy, and that whenever public policy

is advanced by allowing either party to sue for relief against the transaction, then relief is given to him, citing Pomeroy's Equity Jurisprudence, 4th Ed., Section 941, pp. 1998-9. The majority then says that Section 2612, Mississippi Code of 1942, announces a public policy which is strong against the collection of whiskey debts and the enforcement of liens attaching on that account. Therefore, according to the reasoning of the majority, the courts should aid Mrs. Elizabeth Morrissey, or her grantee, in affording her affirmative relief to cancel as clouds on her title deeds of trust given in a whiskey deal, and that this should be done in furtherance of the public policy of this State.

But the fallacy in the reasoning of the majority is the assumption that the purpose of Section 2612 is solely to prevent the collection of whiskey debts. The statute is merely a codification of the common law with reference to illegal contracts. This Court so stated in *Goodman* v. *Swett*, 108 Miss. 224, 66 So. 535, wherein the Court said: "The statute was wholly unnecessary in order to prevent the collection of debts for intoxicating liquors sold in this state, for the reason that the sale of intoxicating liquor therein is illegal, and therefore the courts will not aid in the collection of debts due therefor." The statute did not add or take away from the large body of law involving the non-enforceability of illegal contracts. The public policy behind all the law denying relief to either party to an illegal contract is to deny to wrongdoers the processes of the courts. See discussion *Western Union Telegraph Co.* v. *McLaurin, supra.* The purpose is not solely to deny to the creditor his debt or to aid the debtor in escaping payment of what he honestly owes, as between the parties. Indeed, from the early cases we note that the formulators of the policy embodied in our statute

recognized that as between the parties the debt should be paid; that it was not for the sake of the debtor in an illegal transaction that a remedy was denied the creditor, but considerations of the policy already stated above. We think it is to misunderstand the statute and the historic policy that brought it into being to hold that because of it the court should give affirmative relief to a party to an illegal contract and cancel a conveyance settling a debt that was justly owing, as between the parties.

Appellant has cited no case, and I am unable to find one, holding that in a similar situation public policy demands a party to an illegal contract should be given relief in the courts. A typical case for the application of the rule cited in Pomeroy's Equity Jurisprudence, *supra*, is *City of Philadelphia* v. *Rosin's Parking Lot, Inc.*, 358 Pa. 174, 56 A.2d 207, where certain officials of the city made an unlawful contract with a corporation in reference to not collecting a portion of certain taxes. When the city brought suit to collect the taxes and rescind the illegal contract, the illegality of the contract was set up to prevent the city access to the courts. The court said that the case was not within the rule prohibiting recovery for breach of an illegal contract. I cannot think of any reason why the courts of this State, much less a court of equity, should suspend a general rule of law on grounds of public policy to give affirmative aid to assist Mrs. Elizabeth Morrissey, or her grantee, in escaping the consequences of her illegal contract. Of course, if Bologna could not collect his debt without resorting to the court, then he would be denied relief. But the deeds of trust were capable of being foreclosed *in pais* without the aid of a court, and were so foreclosed.

It is true that the statute says that whiskey debts and the securities therefor are void. This is true of all illegal

contracts whether so declared by statute or the common law. But they are not void in the sense that no property rights can grow out of such illegal transactions. "Such contracts are void in the sense that they are incapable of enforcement in courts of justice, and will not support a remedy. No legal obligation is incurred by either party. But such contracts are not void in the sense that they can confer no rights. They can be executed by the voluntary acts of the parties, or through some means or agency, other than the courts, agreed upon between the parties; and if, and when, so executed, they may confer actual and irrevocable rights upon the parties." *Hall v. Edwards*, 222 S.W. 167 (Tex). See *McBlair v. Gibbes*, 17 How. 232, 15 L. Ed. 132; 12 Am. Jur., Contracts, Section 213, pp. 724, 725. That is what appellee had in this case, an executed contract which needed no court to enforce. I think the learned chancellor correctly dismissed the bill, and his action should, in my opinion, be affirmed.

ETHRIDGE, J., JOINS IN THIS DISSENT.

## APPENDIX "B"

Monday, October 10, 1960, Court Sitting:

Miss Hazel Morrissey

41,525 vs.

Guiseppe Bologna et al.

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Warren County and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court rendered in this cause on the 9th day of September, 1959. be and the same is hereby reversed and this Court now, here, proceeding to render and enter the decree that should have been entered in the Court below doth order and adjudge and decree that the appellant, Hazel Morrissey, is entitled to the relief prayed for in her bills of complaint in Causes Nos. 19,909 and 19,910 in the Court below. It is further ordered and adjudged and decreed that the appellant, Miss Hazel Morrissey, is the true legal and equitable owner of the fee simple title to the lands and property described in the bills of complaint and the instruments hereinafter set out are null and void and constitute a cloud, doubt or suspicion on the said titles of the appellant and are hereby cancelled as such; said instruments so cancelled and annulled are as follows:

1. That certain Deed of Trust executed by Elizabeth M. Morrissey to L. A. Conaty, as Trustee, wherein Guiseppe Bologna is named beneficiary on the 29th day of April, 1953, which instrument is of record in Book 301

at page 184 thereof of the Mortgages and Land Deed of Trust records in the office of the Chancery Clerk of Warren County at Vicksburg, Mississippi.

2. That certain Substituted Trustee's Deed from J. G. Sherard, Substituted trustee to Guiseppe Bologna dated October 9, 1958, and of record in Deed Book 348 at page 52 thereof of the land Deed Records in the Office of the Chancery Clerk of Warren County at Vicksburg, Mississippi.

3. That certain deed of Trust by Elizabeth M. Morrissey and Mike T. Morrissey to L. A. Conaty, as Trustee, wherein Giuseppe Bologna is named beneficiary dated August 5, 1955, which instrument is of record in Book 317 at page 532 of the Mortgages and Land Deed of Trust records in the office of the Chancery Clerk of Warren County at Vicksburg, Mississippi.

4. That certain Substituted Trustee's Deed from J. G. Sherrard, Substituted Trustee to Giuseppe Bologna dated October 9, 1958, and of Record in Deed Book 348 at page 55 thereof of the Land Deed Records in the Office of the Chancery Clerk of Warren County at Vicksburg, Mississippi.

It is further ordered and adjudged and decreed that the appellant do have and recover of and from the appellees all of the costs in this Court and in the Court below to be taxed, etc.

Minute Book "BL" Page 198.

**APPENDIX "C"**

**No. 41,525.**

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**IN THE**

# SUPREME COURT OF THE STATE OF MISSISSIPPI

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(Filed November 8, 1960.)

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MISS HAZEL MORRISSEY,
*Appellant,*

vs.

GIUSEPPE BOLOGNA,
*Appellee.*

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## SUGGESTION OF ERROR AND BRIEF IN SUPPORT THEREOF ON BEHALF OF APPELLEE.

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### I. ERRORS ASSIGNED.

With respect, we propose to demonstrate that the standing opinion of the majority is erroneous, especially in:

1. That said opinion is largely based upon a misstatement of a most consequential fact contrary to the justifiable findings of the Court below and a proper understanding of the testimony of record.

2. That this Court has applied Section 2612 of the Mississippi Code of 1942 to a sale and purchase which was consummated in Louisiana — a Louisiana contract — and based thereon has held that there was no valid debt from Morrissey to Bologna, whereas so doing makes said statute void under the Constitution of the United States of America. As thus construed and upheld, said statute denies the rights guaranteed by the due process clause (Amendment XIV), fails to give full faith and credit to the laws of Louisiana violative of Article IV, Section 1 and results to impair the obligation of a contract contrary to Article I, Section X, Clause 1, of said Federal Constitution.

3. That, alternatively and independently, the Appellee, Mr. Bologna, has been denied the rights guaranteed to him by said Constitution as a citizen of these United States and of the State of Louisiana therein. As a licensed merchant, pursuing a lawful business within the State of Louisiana, the extraterritorial effect given to, and the construction placed by this Court on, said Section 2612 of the Mississippi Code of 1942 denies the rights guaranteed to Appellee under the aforesaid due process and full faith and credit clauses and also is violative of his rights under said Article IV of Section I by impairing the obligations of a valid Louisiana contract.

4. That the Court has actually and mistakenly herein held that it is the public policy of the State of Mississippi to immunize and exonerate from debt those, such as Morrissey, who for years have admittedly been openly engaged within Mississippi in the business of illegally selling intoxicating liquors contrary to our laws; whereas actually the public policy of the State of Mississippi is to prohibit the very trade in which Morrissey was engaged, and the obvious and honorable purpose of said Section 2612 was to protect the individual citizen (the unfortunate

drunkard or wayward) from debts which may have been improvidently incurred for the purchase of such intoxicants from Morrissey and his ilk. To reward those who give bad checks in Louisiana and who then enjoy the fruits of the goods thus obtained by illegal sales for cash within Mississippi to our Mississippi citizens is just plain wrong and therefore contra to "public policy".

5. That the Court has here recognized a conveyance from Elizabeth Morrissey to Hazel Morrissey which was patently a sham; that so treating Hazel as being in a different status from her privy, Elizabeth, the Court has granted relief which this Appellant herself (Hazel) admits would not have been available to her grantor (Elizabeth) with whom she is in privity; and that such chicanery and legal hocus pocus should not have been upheld by this court of justice to enable this Appellant any affirmative relief—much less to enable this Appellant to cancel and avoid true and honest obligations and by simply assuming first mortgage indebtedness amounting to but $25,000 obtain the return of the title to and ownership of properties worth $200,000.

6. That the Court has erred in not applying the doctrines of *res judicata* and of estoppel by judgment as a bar to this suit; and

7. That since Elizabeth Morrissey was admittedly barred from bringing this action under the doctrine of *in pari delicto* and since the Court admits that Hazel derived such, if any, rights which she had from Elizabeth with full and complete knowledge, the doctrine of *in pari delicto* cannot be avoided or vetoed by Hazel—and especially so since she is not, and the Court has not found her to be, a *bona fide* purchaser for a valuable consideration.

Assigning the foregoing errors, Appellee broadly submits that no court of equity and conscience should be a vehicle through which affirmative relief under the circumstances of this case should have been given to the Morrissey bootlegging dynasty; that the particular Appellant, Hazel Morrissey, is, as a successor in title and privy of Mike Morrissey and Elizabeth Morrissey, in no better or purer position. Further, if we in Mississippi desire to enforce our laws prohibiting the sales of whiskey, then we should do so by enforcement of the penal statutes of this State and not by imposition upon lawful merchants of another state who cooperate in the enforcement of the collection of our "black market" taxes and who have been victimized through being the recipients of bad checks. Surely there is, we suggest, no moral or just reason for a court of justice to affirmatively cancel an obligation which grew out of the fact that a Louisiana citizen was victimized by bad checks given to him in Louisiana by a Mississippi citizen for the Mississippian's stock in trade.

## II. ERRONEOUS STATEMENT OF FACT IN COURT'S OPINION.

The Court below heard the testimony and specifically found therefrom that the whiskey involved in this suit was purchased in Louisiana by Mike Morrissey and that Mike Morrissey then transported the whiskey from Louisiana to Mississippi for resale in Mississippi. We quote the Chancellor's finding of fact as follows:

> "2. That the sums evidenced by the said notes and pretended to be secured by said Deeds of Trust were for debts arising as a result of whiskey purchased by the husband of the Complainant, which whiskey was bought in Louisiana and therefrom trans-

ported by complainant's husband to Mississippi for resale in Mississippi." (Ex. R. 155).

We submit that on the evidence in this case the Court below could not have found otherwise than that the whiskey was purchased in Louisiana by Mike Morrissey and by him transported to Mississippi in his truck, and that in fact if the Court below had found otherwise this Court would have had to reverse such finding as being manifestly wrong.

In its opinion herein this Court has mistakenly stated the facts to be that the whiskey was sold to Mike Morrissey in Mississippi, and this Court has concluded therefrom that this was a Mississippi deal and decided this case against the appellees on the basis of this misconception of the facts. We mention the following three statements that appear in the Court's opinion:

1. After pointing out that Mike Morrissey operated an illegal liquor business in Vicksburg, Mississippi, under the firm name of Delta Distributing Company and that Bologna operated a legal wholesale liquor business in Baton Rouge, Louisiana, this Court stated in its opinion that the deliveries of whiskey were made from Bologna's "place of business to Delta Distributing Company under bills of lading, showing delivery to Vicksburg, Mississippi."

2. This Court also stated "that bills of lading for the shipments were made to Vicksburg and the liquor was sold to Morrissey in Mississippi."

3. This Court further stated that "The liquors were sent by Bologna from his place of business in Baton Rouge to Morrissey at Vicksburg with bills of lading attached."

In this case there is therefore a headon collision between the facts found by the Court below and the facts on which this Court decided this case.

It is familiar law that the Chancellor's finding of fact should not be reversed "unless clearly shown to be erroneous" and "only when manifestly wrong." Griffith's Chancery Practice, section 674, and cases there cited.

We believe that a review of the record will convince the Court that the Chancellor was thoroughly justified in his finding that the appellee Bologna sold the whiskey in Louisiana where such sale was legal and that the indebtedness to Bologna for the whiskey was contracted in Louisiana. We further submit that when this misconception of the facts is corrected by the Court it will then see the necessity for affirming this case.

There were two people who testified about the place where the whiskey was sold, namely, Mike Morrissey, who bought the whiskey and the appellee Bologna who sold it. They both agreed that Bologna sold the whiskey to Morrissey in Louisiana for checks given by Morrissey to Bologna in Louisiana, that the whiskey was then loaded on Morrissey's trucks in Louisiana, and that Morrissey hauled the whiskey away from Bologna's place of business in Baton Rouge, Louisiana.

On pages 7 and 8 of Appellee's brief, some of the testimony of Mike Morrissey on this point was quoted and we will therefore not quote it again here. In addition to the testimony of Mike Morrissey quoted in our brief, we quote the following additional portions of his testimony:

Q. Mr. Bologna, along with other wholesalers, liquor dealers, is in the liquor business in Louisiana?

A. Right, sir.

Q. And you can *go over there* and purchase from these various wholesalers, who are in the liquor business?

A. Yes.

Q. And you did do that?

A. Yes." (Ex. R. 55-56, Case No. 41,157).

* * *

"Q. You purchased whiskey from Bologna Brothers, didn't you?

A. Yes, Bologna Brothers.

Q. Now, when you buy this whiskey from these Louisiana dealers—whether from Bologna Brothers or whomsoever it was, you would send over and get it, is that right?

A. Yes." (Ex. R. 110-111, Case No. 41,157).

Mike Morrissey's admissions are uncontradicted that he bought the whiskey in Louisiana, paid for it in Louisiana with checks that "bounced" and transported it himself from Louisiana to Mississippi. This testimony of Morrissey is in itself alone amply sufficient to support the finding of fact of the Court below. We submit that it is also sufficient to prevent this Court from setting aside that finding of fact.

This Court's idea that Bologna delivered the whiskey to Morrissey in Mississippi obviously came from some portions of Bologna's testimony. We submit, however, that if this Court will read all of Bologna's testimony it will see that it is in complete accord with Morrissey's testimony on this point.

The first portion of Mr. Bologna's testimony from whence came the erroneous idea that he delivered the whiskey to Mississippi are the following:

"Q. As a matter of fact you had sold him that whiskey from your place of business, had you not?

A. Yes.

Q. And it was delivered to Mississippi—to Mike Morrissey right here in Vicksburg, Mississippi, was it not?

A. Yes.

Q. And bills of lading for those shipments were made to Vicksburg, Mississippi, weren't they?

A. Yes." (R. 166).

The sole reference in the entire record to so-called "bills of lading" was contained in the above question as framed by Appellant's counsel; and this bare and single reference, when construed along with the remaining testimony of this witness, does not lend true support for the factual conclusions above herein quoted from this Court's opinion.

Then later as shown on page 169 of the record, Mr. Bologna testified: "I do business in Louisiana, not in Mississippi."

Then later as shown on page 170 of the record, Mr. Bologna testified: "I don't sell any whiskey in Mississippi, I sell in Louisiana."

Then later as shown on pages 170 and 171 of the record, Mr. Bologna testified as follows:

"Q. You sell in Louisiana, but invoice it and bill it to Mississippi, don't you?

A. *They come and get it*, and we bill it to the places where they go.

Q. You bill it to Vicksburg, Mississippi, and in that case it was to Mr. Mike Morrissey, wasn't it?

A. Yes.

Q. You bill it to the point where it is sold, don't you?

A. No, I don't know where—after they arrive here they do what they want to with it—

Q. After it arrives in Vicksburg they do what they want with it?

A. Yes.

Q. And so your interest is in it until it gets to Vicksburg?

A. I have an interest in it when they pick it up at my place—I get $4.50 in the State of Louisiana, they got to bring it out of the State and they got a man in Louisiana that come over there and check these people out, we have to bill to get a rebate from the State—

Q. You have to bill to Mississippi?

A. Out of the State—

Q. Out of the State—and in Mike T. Morrissey's case the whiskey was sold to him in Mississippi?

A. Yes.

Q. And his place of business was the Delta Distributing Company, in the downtown area of Vicksburg, Mississippi?

A. Yes." (R. 170-171).

The questions and answers quoted above confused the selling of the whiskey to Mike Morrissey and the reporting of such sales by Bologna to the Collector of Revenue of Louisiana in accordance with the Alcoholic Beverage Control Law of Louisiana, especially Sec. 372 of Chapter 2 of Title 26 of the 1950 Louisiana Revised Statutes, and further confused the matter with the later reporting of the sales to the State Tax Collector of Mississippi so that the latter could collect taxes from Morrissey. If the last two quoted questions and answers are taken by themselves without regard to the other testimony of Bologna and the testimony of Morrissey, they would of course support a finding that the whiskey was sold in Mississippi. However, we submit that all of the testimony should be considered together.

After the above testimony was given, Mr. Bologna proceeded to clear up the confusion as to what he had meant by his testimony.

As shown at page 173 of the record, he testified as follows:

"Q. Where is your place of business?

A. Baton Rouge.

Q. And he would send his truck down there and get it, is that right?

A. Yes, that's right.

Q. Would you sell him for cash or credit?

A. He used to send a check with the truck driver, when we feel like loading we get the check, and for a while the checks were O. K., and around 1953, they started bouncing back.

Q. So you were making these sales for cash at the place the whiskey was delivered—at Baton Rouge?

A. Yes.

Q. Excepting when the checks bounced?

A. Yes.

Q. Was that the way the first indebtedness came about?

A. Yes."

And then as shown at page 174, Mr. Bologna testified as follows:

"Q. Now, how did you happen to have the $25,000 mortgage on the Southall place—was that checks that had bounced?

A. Yes.

Q. The sales had been made for cash?

A. Yes.

Q. That was over in Louisiana?

A. Yes.

Q. But the checks you had weren't any good?

A. That's right."

And at pages 175 and 176 of the record, Mr. Bologna testified:

"Q. That was also for whiskey you sold him in Louisiana?

A. Yes.

Q. Now, Mr. Bologna, after Mr. Morrissey sent down there and bought the whiskey from you, and you loaded it on his truck, and he either gave you a check, or whatever he gave you, did you have anything further to do with that whiskey, or further interest in the whiskey?

A. No, sir.

Q. Now the word 'commission' was used here, do you get a commission on whiskey Mr. Mike Morrissey sold, or a commission on what he got?

A. No.

Q. Do you have a price?

A. We have a set price.

Q. Did you sell Mr. Mike Morrissey at that set price?

A. Yes, the same as anybody else.

Q. And it was supposed to be cash?

A. Yes.

Q. And it is in that price—which includes a profit for you, if he pays, is that correct?

A. Yes.

Q. Now the question is—aside from his paying you, if the checks hadn't bounced for the whiskey—you had no interest in his whiskey, did you?

A. No, sir, nothing whatever—I had no interest in what he was doing with his whiskey.

Q. You had no interest in what he was doing with his whiskey?

A. No. After it got on the truck, the whiskey belonged to him after it leaves my place.

Q. It was his?

A. Yes.

Q. And you had no interest in what he did with it?

A. No, sir.

Q. That is the way it was?

A. Yes, that is the way it was."

There is of course no bill of lading in the record herein, but as shown at pages 182 and 183 of the record, Mr. Bologna explained that the taxing authorities of Mississippi, "Mr. Winters", furnished him with an approved list of Mississippi Liquor dealers to whom he should sell and that, cooperating with the authorities of Mississippi, he refused to sell anyone who was not on that approved list.

We respectfully submit that from the foregoing testimony it is apparent that the whiskey was sold and delivered by Bologna to Morrissey in Louisiana in exchange for Morrissey's checks delivered in Louisiana; that the whiskey was loaded on Morrissey's trucks in Louisiana; that thereafter Bologna had no ownership in or control over the whiskey; that Morrissey then took the whiskey on his own trucks into Mississippi. The three references in the Court's opinion to a bill of lading are all based on the one question framed by the attorney for Miss Morrissey, and the Court uses this one confusing question and answer to disregard all of the other testimony in the record of both the seller and buyer that the transaction was a Louisiana transaction insofar as Bologna was concerned. Certainly, as held by this Court in *Posey* v. *Witherspoon*, 85 So.2d 908, 227 Miss. 189, it is for the trier of facts who hears the witnesses to appraise any contradictions and confusion within the testimony of a witness and, searching for the truth, to determine when the witness is confused or mistaken, and to truly appraise the testimony of the witness as a whole.

In any event, we submit with deference that the finding of fact by the court below is supported by substantial evidence, is obviously not manifestly wrong, and that this Court is bound by that finding.

In addition to the fact that the whiskey was delivered to Morrissey in Louisiana, we direct the Court's attention to the undisputed testimony quoted above that the sales of whiskey by Bologna to Morrissey were not credit sales but were sales for cash. Morrissey paid for each purchase at the tim of delivery with a check. The checks "bounced" and that resulted in the indebtedness to Bologna. In other words, these were valid Louisiana sales, were intended to be for cash, and Morrissey would not have owed Bologna anything if he, Morrissey, had not violated the criminal statutes of Louisiana by giving bad checks.

## III. THE APPLICATION OF SECTION 2612, MISSISSIPPI CODE OF 1942, TO THE CIRCUMSTANCES OF THIS CASE MAKES SAID STATUTE VOID UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

In its opinion the Court recognized that Appellee from the inception of this litigation has contended: "He (Bologna) says also that the indebtedness was incurred in Louisiana, where it could be validly contracted, and that same must be governed by the laws of that state; and that the court should uphold the title vested." A division of Appellee's brief, pages 29-33 thereof, was expressly devoted to the proposition that: "The provisions of Section 2612, Mississippi Code of 1942, have no extraterritorial effect; and an indebtedness validly incurred in Louisiana is not within the terms of said Section 2612." Citingthe general law, bulwarked by quotations from deci-

sions of both the Supreme Court of the United States and of this Court, we therein pointed out that this Mississippi statute has no extraterritorial effect and could not constitutionally serve to invalidate an obligation which was validly contracted in Louisiana and governed by the laws of that State. Nevertheless this Court held that when Morrissey, a citizen of Mississippi, elected to dishonor his checks delivered to Bologna in Louisiana in purported cash payment for whiskey there purchased by him from Bologna (a lawful wholesaler of liquors within the State of Louisiana) Section 2612 of the Mississippi Code of 1942 became applicable to invalidate the debt, with the consequence that this debt being thus invalid the security later given therefor was likewise invalid.

This Court held that Bologna's contention that this debt was valid because it was contracted in and governed by the laws of Louisiana was untenable. Citing and, we respectfully submit, misapplying the case of *Goodwin* v. *Swett*,* 108 Miss. 224, 66 So. 535, as an authority this Court held: "Thus the appellee's contention that his debt is valid because it was contracted in Louisiana is untenable." Then the Mississippi statute was expressly and exclusively applied to invalidate the debt and, as a consequence, the security given therefor. This Court, in its majority opinion, held, and we quote:

> "Bologna trusted and gave credit to Mike T. Morrissey for intoxicating liquors. Under the statute, he lost his debt and is forever disabled from recovering

*See discussion pages 27 and 32 of Appellee's Original Brief. To hold that our courts are not open to enforce collections of liquor debts is one thing; to hold that our courts are open to cancel, and that our statutes result to void, otherwise valid Louisiana debts and to thereby force return of properties delivered (vested) in payment thereof is quite another.

it. The notes and deeds of trust were given for the purpose of securing the debt. Again, the statute makes these securities void."

"Under the statute, Bologna had lost his debt, and his notes and deeds of trust were void. He had nothing. In law, he was not even a creditor."

"Indeed Bologna could not, by this foreclosure, have title vested in himself, and thereby enforce an invalid debt, which, by statute, had been lost, and the security for which had become wholly void."

As thus upheld and construed this Mississippi statute is palpably void under the Constitution of these United States of America. At bar the Supreme Court of Mississippi has extended the application of said Section 2612 to dealings had in the State of Louisiana; that thus applying and sustaining the validity of this Mississippi statute to invalidate an otherwise lawful Louisiana transaction (thereby to enable an illegal Mississippi "bootlegger" to affirmatively void and cancel deeds given to supplant his dishonored checks) violates the Constitution of the United States of America. Through this suggestion of error, being our first occasion and opportunity so to do, we contend and submit that the statute of Mississippi as thus upheld is void under the Federal Constitution, showing:

**(1) That This Court Could Not, Based on Section 2612 of the Mississippi Code of 1942, Declare Invalid Obligations Which Were Governed by and Valid under the Laws of Louisiana; but This Court Must, under the Full Faith and Credit Clause (Article XIV, Section 1) of the Federal Constitution, Respect and Uphold the Laws of Louisiana.**

Forty-nine states of the Union have legalized, under various systems of control, the sale of intoxicating liquors.

Louisiana is one of the states which in the exercise of its sovereignty legalized the sale of intoxicants; and Appellant concedes that Appellee was at all times here pertinent a licensed wholesaler within Louisiana operating from an established place of business in Baton Rouge therein. This Appellee was by the laws of Louisiana lawfully authorized to sell whiskey to Mike Morrissey, who held a Federal permit.

There was no law of Louisiana prohibiting sales and deliveries of liquor therein simply because that person might transport the product thus lawfully acquired into the State of Mississippi.

Mississippi also is a sovereign state and has elected to prohibit by statute the sales of intoxicants within our borders and has made such sales herein a criminal offense. Now neither the courts nor the people of Louisiana object to Mississippi enforcing its laws, but after all the onus of enforcing the laws of Mississippi may not be cast upon a lawful merchant within Louisiana there plying his trade in accordance with the laws of that state.

The record at bar shows and the opinion of this Court recites that Mike Morrissey for years has been engaged in the illegal liquor business in Mississippi. Mike asserted that "everybody" knew (Ex. R. 53) that he was in this business—and that would mean from the governor through the sheriffs on down. Apparently the executive branch of the government has not elected to enforce our penal laws and prohibit the condemned traffic. Plus this, Mississippi legislation exacts a "black market" tax against whiskey sales, from which over the years millions in revenues have been collected and paid into our State treasury and used to support our State government, our schools, the salaries of our state officials, etc.

The Appellant here has urged that the purchases of intoxicants admittedly made by Mike Morrissey in Louisiana through the delivery of his dishonored checks were in violation of said Section 2612 of the Mississippi Code; that consequently the debts which arose when Mike's checks were dishonored and the security given therefor were void. This Court erroneously agreed, thereby to endow this Mississippi bootlegger with a free stock of trade, from which he certainly illegally reaped in excess of $100,000 at the expense of Mr. Bologna.

The constitutional question then is: Can the prohibition law of Mississippi invalidate obligations incurred in Louisiana for whiskey there bought and delivered? In *Broderick* v. *Rosner*, 294 U.S. 629, 79 L. Ed. 1100, 55 S. Ct. 589, in an opinion authored by Justice Brandeis, the Supreme Court of the United States held that statutes are "public acts" within the meaning of the full faith and credit clause and further held that obligations validly imposed by statutes of a state having jurisdiction of the subject matter and of the parties must be given full faith and credit by all other states; that the forum (in this case Mississippi) is not privileged to apply its own substantive law, statutory or judicial, when clearly in conflict with the statutes of Louisiana where the sale was consummated and the delivery made. See National Mut. Bldg. & L. Asso. v. Brahan, 193 U.S. 635, 48 L. Ed. 823, 24 S. Ct. 532; Olmsted v. Olmsted, 216 U.S. 386, 54 L. Ed. 530, 30 S. Ct. 292, 25 L.R.A. N.S. 1292; Converse v. Hamilton, 224 U.S. 243, 56 L. Ed. 749, 32 S. Ct. 415, Ann. Cas. 1913D, 1292; New York L. Ins. Co. v. Head, 234 U.S. 149, 58 L. Ed. 1259, 34 S. Ct. 879; Supreme Council, R. A., v. Green, 237 U.S. 531, 59 L. Ed. 1089, 35 S. Ct. 724, L.R.A. 1916A, 771; Hood v. McGehee, 237 U.S. 611, 59 L. Ed. 1144, 35 S. Ct. 718; Marin v. Augedahl 247 U.S. 142, 62 L. Ed. 1038, 38

S. Ct. 452; Aetna L. Ins. Co. v. Dunken, 266 U.S. 389, 69 L. Ed. 342, 45 S. Ct. 129; Modern Woodmen v. Mixer, 267 U.S. 544, 69 L. Ed. 783, 45 S. Ct. 389, 41 A.L.R. 1384; Bradford Electric Light Co. v. Clapper, 286 U.S. 145, 76 L. Ed. 1026, 52 S. Ct. 571, 82 A.L.R. 696; Alaska Packers Asso. v. Industrial Acci. Com., 294 U.S. 532, 79 L. Ed. 1044, 55 S. Ct. 518; Chandler v. Peketz, 297 U.S. 609, 80 L. Ed. 881, 56 S. Ct. 602; John Hancock Mut L. Ins. Co. v. Yates, 299 U.S. 178, 81 L. Ed. 106, 57 S. Ct. 129; Sovereign Camp, W. W., v. Bolin, 305 U.S. 66, 83 L. Ed. 45, 59 S. Ct. 35, 119 A.L.R. 478; Pacific Employers Ins. Co. v. Industrial Acci. Com., 306 U.S. 493, 83 L. Ed. 940, 59 S. Ct. 629; Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 85 L. Ed. 1477, 61 S. Ct. 1020; Griffin v. McCoach, 313 U.S. 498, 85 L. Ed. 1481, 61 S. Ct. 1023, 134 A.L.R. 1462; Pink v. A.A.A. Highway Exp., 314 U.S. 201, 86 L. Ed. 152, 62 S. Ct. 241, 137 A.L.R. 957; State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154, 89 L. Ed. 812, 65 S. Ct. 573; Cardillo v. Liberty Mut. Ins. Co., 330 U.S. 469, 91 L. Ed. 1028, 67 S. Ct. 801; United Commercial Travelers v. Wolfe, 331 U.S. 586, 91 L. Ed. 1687, 67 S. Ct. 1355, 173 A.L.R. 1107.

Surely the courts of Mississippi are not constitutionally privileged to extend the application of our Section 2612 whereby to void and nullify an indebtedness which arose from dealings had within Louisiana and which were valid under the laws of Louisiana; and said Section 2612 as thus construed and applied is void under the full faith and credit clause of the Federal Constitution. We in Mississippi are simply not privileged to make our State a mecca for bootleggers or a haven for those who would ignore their debts and disregard their contractual obligations to their unjust enrichment when so to do results from a failure to properly apply the laws of a sister

state—any one of the other forty-nine states of the Union, all of which have elected to legalize the sale of intoxicants.

**(2) That the Giving of Extraterritorial Effect to Said Section 2612, Mississippi Code of 1942, Violates the Due Process Clause (Amendment XIV) of the Federal Constitution.**

In our original brief we cited and quoted from the case of *Hartford A. & T. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143, 54 S. Ct. 634, 78 L. Ed. 1178, 92 A.L.R. 928. A reading of that decision, coupled with the later decision of this Court rendered in the case of *Protective Life Ins. Co.* v. *Lamarque*, 180 Miss. 243, 177 So. 15, properly applied to the facts of the case at bar demonstrates that the standing majority opinion is in clear violation of the Fourteenth Amendment to the Constitution of the United States.

Concluding our argument on this point, we cite the case of *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 74 L. Ed. 926, 50 S. Ct. 338, 74 A.L.R. 701, and we quote excerpts from the observation of the annotator appearing 74 A.L.R. 718-719, as follows:

> "Where a contractual right, acquired in another state, is valid under the laws of such state, and the public policy of the forum as expressed by its statutes, requires or imposes additional obligations or burdens on one of the contracting parties under certain contingencies, refusal to recognize and enforce the contractual rights of the parties as fixed by the situs of the contract, and the application of the statute of the forum, has the effect of impairing the obligations of the contract, and also of giving to the statute of the forum an extraterritorial operation which cannot be done under the constitutional provisions. This situation was presented in Aetna L. Ins. Co. v. Dunken, (1924) 266 U.S. 389, 69 L. Ed. 342, 45 S. Ct. 129, an action in Texas upon an insurance

contract entered into in Tennessee, where the Texas statute required of the insurer payment of 12 per cent damages and attorneys' fees for failure to make prompt payment, and no such penalty was imposed by the law of Tennessee, the situs of contract. The United States Supreme Court held that the rights of the insurance company must be adjudicated according to the laws of Tennessee, on the ground that the Texas statute was incapable of being constitutionally applied, since the effect of such application would be to regulate business outside the state of Texas, and control contracts made by citizens of other states in disregard of their laws, under which penalties and attorneys' fees are not recoverable."

**(3) That the Standing Opinion Applying Mississippi's Section 2612 to This Louisiana Contract Results to Impair the Obligations of That Contract in Violation of Article I, Section 10, Clause 1, of the Constitution of the United States.**

As said in the case of *Murray* v. *City Council of Charleston*, 6 Otto. 432, 96 U.S. 432, 24 L. Ed. 760:

> "There is no more important provision in the Federal Constitution than the one which prohibits States from passing laws impairing the obligation of contracts, and it is one of the highest duties of this court to take care the prohibition shall neither be evaded nor frittered away. Complete effect must be given to it in all its spirit. The inviolability of contracts, and the duty of performing them, as made, are foundations of all well ordered society and to prevent the removal or disturbance of these foundations was one of the great objects for which the Constitution was framed."

In the case of *City of Chicago* v. *Sheldon*, 9 Wall. 50-56, 76 U.S. 45, 19 L. Ed. 594, it was observed:

> "* * * A contract having been entered into between the parties, valid at the time, by the laws of the State, it is not competent even for its Legislature to pass an Act impairing its obligation, much less could any decision of its courts have that effect."

The parties to the dealings before this Court had no reason to apprehend that a Mississippi statute would be projected as applicable whereby to invalidiate this contract which was truly governed by the laws of Louisiana. This Court in its majority opinion not only passed upon the validity of the contract based on dealings had wholly within Louisiana but sought to affirmatively nullify the effect of that contract, one which was actually valid under the laws of Louisiana. The Court went on to hold that when Bologna accepted Morrissey's checks in Louisiana for whiskey there delivered to Morrissey and Morrissey later elected to dishonor those checks Bologna had nothing; that "in law, he was not even a creditor."

The case of *Dartmouth College* v. *Woodward*, 4 Wheat. 518, 4 L. Ed. 629, one of the landmarks of the jurisprudence, in an opinion by Chief Justice Marshall contains many teachings which here should be regarded. The court there determined that the charter was a contract, the obligation of which could not be impaired without violating the Constitution of the United States. Surely at bar there was a true and actual contractual obligation for Morrissey to pay Bologna the sum of his dishonored checks, on the faith of which he had received the product which Bologna was then and there lawfully authorized to sell and deliver to him. For this Court to now inject Section 2612 of our Code as invalidating that contract when that section was not initially applicable to that deal makes said Section 2612 void by, under the circumstances of this case, resulting to impair and nullify an otherwise valid contractual obligation.

We have not sought to exhaust the authorities on the Federal constitutional questions above herein discussed. For many additional authorities, the Court is respectfully referred to the annotations appearing 74 A.L.R. 710; 100 A.L.R. 1143; and 134 A.L.R. 1472.

## IV. ALTERNATIVELY AND INDEPENDENTLY, THE APPELLEE, MR. BOLOGNA, BY THE MAJORITY OPINION HAS BEEN DENIED RIGHTS GUARANTEED TO HIM UNDER THE CONSTITUTION OF THE UNITED STATES OF AMERICA.

If the Court shall continue to sustain the validity of Section 2612 against the contention that under the facts and circumstances of this case it is clearly void as violative of the Constitution of the United States, then we ask the Court to nevertheless accord to Mr. Bologna, as an individual citizen, the benefit of the constitutional rights guaranteed to him. Surely as an individual Mr. Bologna was entitled to lawfully pursue his trade according to the laws of the State of Louisiana where he was there licensed and authorized to do business. Surely as an individual citizen he was entitled, if he so elected, to sell to Mike Morrissey there in Louisiana the very product which he was authorized by the Louisiana laws to there sell and deliver. Surely Mr. Bologna was authorized to accept Mike's check on the faith that they would be honored and paid. Surely when these checks were not paid there was an obligation on Mike's part to make them good. Now this Court has held that there was no such obligation; that because Mr. Bologna was a wholesaler of intoxicants there was no obligation on Mike's part to pay him for these intoxicants; that the debt was non-existent and void, with the consequence that the security given therefor was equally void.

Thus concluding, this Court then proceeded to grant affirmative relief by ordering the cancellation of the deeds in favor of Appellee and the consequent return to Appellant, as the successor and privy of both Mike and Elizabeth Morrissey, of the title to and ownership of the properties which had been delivered in payment of the valid Louisiana debt. We submit that this conclusion violates the individual constitutional rights of the Appellee, Bologna, in the particulars mentioned.

## APPENDIX "D"

Monday, November 28th, 1960, Court Sitting: : : : : :

Miss Hazel Morrissey

No. 41,525 vs.

Guiseppe Bologna et al.

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

Minute Book "BM" Page 222.

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Office-Supreme Court, U.S.
FILED
APR 17 1961
JAMES R. BROWNING, Clerk

# Supreme Court of the United States

OCTOBER TERM, 1960.

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## No. 829

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GUISEPPE BOLOGNA,

Appellant,

versus

HAZEL MORRISSEY,

Appellee.

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On Appeal from the Supreme Court of the State of Mississippi.

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## MOTION TO DISMISS APPEAL.

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FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

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No. 829.

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GUISEPPE BOLOGNA,

Appellant,

versus

HAZEL MORRISSEY,

Appellee.

---

On Appeal from the Supreme Court of the State of Mississippi.

---

## MOTION TO DISMISS APPEAL.

NOW COMES the Appellee and moves the Court to dismiss the appeal from the Supreme Court of Mississippi requested herein for the reason that a substantial federal question is not presented.

FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

## CERTIFICATE OF SERVICE.

I, Frank E. Everett, Jr., of counsel for Miss Hazel Morrissey, Appellee, in the above cause and a member of the bar of the Supreme Court of the United States, do hereby certify that service of the above Motion to Dismiss Appeal has been had upon Honorable Landman Teller, Counsel of Record for the Appellant by personally delivering a true and correct copy of the above and foregoing Motion to him at his office at 1205 Monroe Street, Vicksburg, Mississippi.

This the 12 day of April, 1961.

FRANK E. EVERETT, JR.,
Of BRUNINI, EVERETT, GRANTHAM & QUIN,
810 First National Bank Building,
Vicksburg, Mississippi,
Attorneys for Appellee.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1960.

No. 829.

GUISEPPE BOLOGNA,
Appellant,

versus

HAZEL MORRISSEY,
Appellee.

On Appeal from the Supreme Court of the State of Mississippi.

## BRIEF IN SUPPORT OF APPELLEE'S MOTION TO DISMISS APPEAL.

No substantial federal constitutional question is presented in this case.

The courts in Mississippi, including the Court of Final Resort, have determined the facts based primarily on the uncontroverted admissions of the Appellant Bologna himself.

The Mississippi Supreme Court found that the record of testimony in the case clearly showed the following:

> "Bologna, called as an adverse witness, admitted that he had been selling liquor to Mike T. Morrissey, operating in the City of Vicksburg as Delta Distributing Company since 1946; that his place of busi-

> ness was in Baton Rouge, Louisiana; that he went back and forth to Vicksburg to confer with Morrissey; that bills of lading for the shipments were made to Vicksburg and the liquor was sold to Morrissey in Mississippi; that he knew that Morrissey was selling this liquor in Mississippi; that the notes and deeds of trust involved in this litigation were given as security for Morrissey's purchases of liquor; that he knew that the sale of liquor in Mississippi was illegal; that he had been in Morrissey's place of business about fifty times, and, on occasions, had made collections while there; and that the notes and deeds of trust were executed and delivered in Mississippi." Opinion of the Supreme Court of Mississippi, page A6 of Appellant's Jurisdictional Statement.

In the Jurisdictional Statement, the Appellant argues that the Court should have found differently on a purely factual determination.

This Honorable Supreme Appellate Court will not go behind the final adjudication of facts duly made by the courts of Mississippi having jurisdiction. To do otherwise would make this august Appellate Court a menial fact finding body.

Appellant's Jurisdictional Statement patently discloses many reasons why there is no substantial federal constitutional question for this Court.

1.

There was no original "Louisiana Contract" of sale and the whiskey was not "bought in Louisiana". As the Ap-

pellant Bologna admitted and the Mississippi Supreme Court adjudicated, the bills of lading on said liquor sales showed delivery to Vicksburg, Mississippi, where the transaction was completed and consummated by such delivery. It was therefore a Mississippi transaction and was subject entirely to the Laws of Mississippi pertaining to such sales.

In a sale of this type, delivery was an essential element and the sale was not completed until delivery under the bill of lading had been accomplished at the destination shown by such bills of lading.

All of this the Appellant Bologna admitted on cross-examination.

B[illegible]ppellant says that this Court should accept what Bologna testified to on a direct examination under the obvious leading of his counsel and reject what he said on cross-examination.

We earnestly submit that this is a question for the Mississippi Court and it has been determined by the Court of Final Resort in Mississippi.

In 11 Am. Jur. 395, Section 113 it is stated:

> "In many cases, as in transactions involving the sale of liquor, there may be statutes in one jurisdiction restricting the rights of the parties or even rendering the entire transaction void if the sale is consummated therein, whereas in another jurisdiction no such statutes exist. Delivery of the property is

> generally, though not necessarily, the act by which an executory contract becomes an executed contract. Therefore, in such case, the place of delivery is generally the place where the executed contract is deemed to have been made."

The sale agreement contemplated that this was to be an interstate transaction with delivery in Mississippi so that Appellant Bologna could get his rebate from the State on such sales. It was therefore an executory sale until completed by delivery in Mississippi. (R. 170-171.) (Appellant's Jurisdictional Statement, p. A28.)

It is quite plain that the Mississippi Courts have determined that the place of completion and delivery was Vicksburg, Mississippi and that this was consequently a Mississippi sale and not a Louisiana sale. That was a purely factual question.

2.

Whatever and wherever the original transaction might have been, it was superseded later by the written Notes and Deed of Trust evidencing such whiskey purchase and securing such purchase price. The Notes and Deed of Trust were executed in Mississippi. They were delivered in Mississippi. The Deed of Trust securing the Notes covered Mississippi land. These documents evidencing and securing the sale were entirely subject to the Laws of Mississippi which refuses to recognize such debt and such security. Section 2612, Mississippi Code of 1942.

This suit to remove and cancel a cloud on the title to Mississippi land filed in the Mississippi Chancery Court involved a Mississippi Deed of Trust, Mississippi land and a Mississippi foreclosure under said Mississippi Deed of Trust.

This was a matter exclusively for the Courts of Mississippi and did not involve any constitutional question whatever.

3.

In the execution and delivery of the Notes and Deed of Trust under which Appellant Bologna claims his spurious title, the remedy thereunder in Mississippi became a part of the contract as if expressly written therein.

Section 2612, Mississippi Code of 1942 provides that there is no remedy to enforce a whiskey debt in Mississippi wherever made.

This law applies to the citizens of Mississippi and to citizens of other states who seek to enforce such remedy in Mississippi and there is no favoritism or disclamation. The outside citizens and the local citizens are treated exactly alike.

In *Goodman v. Swett*, 108 Miss. 224, 66 So. 535 where the debt sued on was contracted in the State of Missouri, the Mississippi Supreme Court held that the above mentioned Section 2612 of the Mississippi Code of 1942 barred "*all persons from* collecting in the courts of this state any debt so contracted".

In the present case, the Mississippi Supreme Court interpreting the Mississippi Statute stated:

> "Indeed Bologna could not, *by this foreclosure,* have title vested in himself and thereby enforce an invalid debt, which, by statute, had been lost, and the security for which had become wholly void." Appellant's Jurisdictional Statement, page A11.

In so holding, the Supreme Court of Mississippi applying its own statutory law to its own land with equal force to Mississippians and citizens of other states holds that there is no remedy in Mississippi by foreclosure in pais to enforce a liquor debt.

Therefore the Mississippi Supreme Court holds that there is no remedy for the collection of an enforcement of a liquor debt in the Courts of Mississippi through court proceedings or by foreclosure in pais.

This was by implication written into the contract which the Appellant Bologna made in this case.

Even if the original sale was a Louisiana contract, which we most strongly deny, the remedy in Mississippi became a part of the sale which was not enforceable in Mississippi in the courts or by foreclosure in pais.

As we have previously pointed out, the original transaction became merged into the written Notes and Deed of Trust which were executed and delivered in Mississippi and are subject absolutely to Mississippi Law.

4.

The present action is a suit to remove a cloud on title involving land in Mississippi and is subject entirely to the law of property in Mississippi and the interpretation of Mississippi Statutes by the Mississippi Supreme Court.

5.

Regardless of where the sale was consummated, in Louisiana or Mississippi, Appellant Bologna admitted that he knew that the whiskey was purchased with the intention of reselling it in Mississippi in violation of law. He aided in that violation by making the bills of lading an interstate shipment across the state line for delivery into Mississippi where he knew that the sale of whiskey was prohibited by law.

He likewise knew that he had no remedy for the enforcement or collection of said debt in Mississippi and that became a part of his sale contract by necessary implication.

This type of transaction has been condemned for many years in many states. An example of the application of the rule is found in *Knowlton v. Doherty* decided by the Supreme Court of Maine in 1895 and reported in 33 Atlantic 18.

6.

Mississippi, in dealing with its own notes, deeds of trust and its own land is in no sense extraterritorial.

It is the Appellant Bologna who seeks to make the laws of Louisiana extraterritorial by imposing the Louisiana Law outside of his own state into the State of Mississippi against the expressed statutory law of Mississippi and against the expressed public policy of the State of Mississippi.

7.

Assuming for argument only that the transaction was a Louisiana sale, the Louisiana Law cannot be enforced in Mississippi under the full faith and credit clause or under the Fourteenth Amendment where such endorsement would be obnoxious to the strongly expressed public policy of Mississippi. (See Opinion of Mississippi Supreme Court, Jurisdictional Statement, p. A10.)

This Honorable Court so declared in *Griffin v. McCoach*, 313 U.S. 498, 85 L. Ed. 1481 and further held that:

> "It is for the state to say whether a contract contrary to such a statute or rule of law is so offensive to its view of pubilc welfare as to require its courts to close their doors to its enforcement."

## CONCLUSION.

The entire jurisdictional statement of the Appellant is predicated on the existence of a "Louisiana Contract" and a completed purchase of liquor in Louisiana, a factual situation adversely determined by a Court with proper jurisdiction.

Even so, the original transaction was merged into the written notes and Deed of Trust executed and delivered in Mississippi involving Mississippi land as security.

All questions have been fully determined without conflict by this Court.

The validity of the Mississippi Statute is not challenged.

The Mississippi Supreme Court has not expressly passed on any federal question in this case.

The judgment rests on an adequate non-federal basis.

We earnestly submit that there is no basis for the Supreme Court of the United States to assume jurisdiction of this thoroughly litigated local dispute.

Respectfully submitted,

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Attorneys for Appellee.

## CERTIFICATE OF SERVICE.

I, Frank E. Everett, Jr., of counsel for Miss Hazel Morrissey, Appellee, in the above cause and a member of the bar of the Supreme Court of the United States, do hereby certify that service of the above Brief in Support of Appellee's Motion to Dismiss Appeal has been had upon Honorable Landman Teller, Counsel of Record for the Appellant by personally delivering a true and correct copy of the above and foregoing Brief to him at his office at 1205 Monroe Street, Vicksburg, Mississippi.

This the 12 day of April, 1961.

FRANK E. EVERETT, JR.,
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960.

## No. 829.

GIUSEPPE BOLOGNA,
*Appellant,*

vs.

HAZEL MORRISSEY,
*Appellee.*

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

## BRIEF OPPOSING MOTION TO DISMISS APPEAL.

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## BRIEF OPPOSING MOTION TO DISMISS APPEAL.

Moving to dismiss the appeal, Appellee submits that: "There was no original 'Louisiana Contract' of sale and the whiskey was not 'bought in Louisiana'." Appellee then cites 11 Am. Jur. 395, Section 113, to support the contention that "the place of delivery is generally the place where the executed contract is deemed to have been made".*

*Though Appellant largely anticipated and covered in his Jurisdictional Statement the matters now brought to the fore by Appellee (particularly at pages 9 and 10 thereof) this brief response may well prove to be time-saving to this Court, as well as to properly emphasize the correctness of Appellant's position.

The Supreme Court of Mississippi did not find that this was not a Louisiana contract. That Court recognized in its opinion that the trier of the facts had expressly found "that these instruments (the deeds of trust which, by the decision here appealed from, stand cancelled) evidenced the debts of * * * Mike T. Morrissey for whiskey *which he purchased in Louisiana and transported to Mississippi for resale*". (A3 of "Jurisdictional Statement", 123 So.2d 540)

This finding of fact that Morrissey bought the liquor in Baton Rouge, Louisiana, which was there loaded on Morrissey's own trucks and by Morrissey transported into Mississippi not only finds support in the Record, but is an uncontradicted fact. But two people testified on this feature.

The purchaser, Morrissey, answering a question put by his own counsel, swore:

> "* * * I will venture to say that during that month we turned over approximately a half a million dollars of merchandise—during that period of time, I had a check or two to bounce, and Bologna Brothers—of course we were buying whiskey from Bologna Bros., we were buying whiskey from Strauss, buying whiskey from Glazier, and from other wholesalers *in Louisiana*, * * *." (Appeal Record, pp. 139-140)

See additional quotations from Morrissey's testimony A25 and A26 of Jurisdictional Statement.

The seller, Bologna, concurred that "they (Morrissey and his ilk) come and get it, and we bill it to the places where they go." (Appeal Record, p. 357) And Bologna further testified, as we quote:

> "Q. Tell the Court how Mr. Morrissey would come over and get the whiskey he did get?

A. He used to call at the office and give me the order, and send a truck with power of attorney to load the truck *and have the truck pick up between $20,000 and $25,000 of merchandise.*

Q. Where is your place of business?

A. Baton Rouge.

Q. And he would send *his truck* down there and get it, is that right?

A. Yes, that's right.

Q. Would you sell him for cash or credit?

A. He used to send a check with the truck driver, when we feel like loading we get the check, and for a while the checks were O.K., and around 1953 they started bouncing back.

Q. So you were making these sales for cash at the place the whiskey was delivered– at Baton Rouge?

A. Yes." (Appeal Record, p. 360)

* * *

"Q. You had no interest in what he was doing with his whiskey?

A. No, after it got on the truck, the whiskey belonged to him after it leaves my place (referring to Bologna's place in Baton Rouge, Louisiana).

Q. It was his?

A. Yes.

Q. And you had no interest in what he did with it?

A. No, sir.

Q. That is the way it was?

A. Yes, *that is the way it was.*" (Appeal Record, p. 363)

The State Supreme Court did not find that the trier of facts erred in concluding that Morrissey bought the whiskey in Louisiana and then himself transported it therefrom to Mississippi for resale. Bologna and Morrissey both swore that "that is the way it was", and that is what and all that the Record shows.

As this Court said in *Creswill* v. *Grand Lodge K. of P.*, 225 U.S. 246. 56 L. Ed. 1074:

"* * * While it is true that upon a writ of error to a state court we do not review findings of fact, nevertheless two propositions are as well settled as the rule itself, as follows: (a) that where a Federal right has been denied as the result of a finding of fact which it is contended there was no evidence whatever to support, and the evidence is in the record, the resulting question of law is open for decision; * * *."

Otherwise in *Sterling* v. *Constantin*, 77 L. Ed. 375, 287 U.S. 378:

"* * * Accordingly, it has been decided in a great variety of circumstances that when questions of law and fact are so intermingled as to make it necessary, in order to pass upon the Federal question, the court may, and should, analyze the facts. Even when the case comes to this Court from a state court this duty must be performed as a necessary incident to a decision upon the claim of denial of Federal right. Kansas City S. R. Co. v. H. Albers Commission Co., 223 U.S. 573. 591, 56 L. ed. 556, 565, 32 S. Ct. 316; Creswell v. Grand Lodge K. P., 225 U.S. 246, 261, 56 L. ed. 1074, 1080, 32 S. Ct. 822; Northern P. R. Co. v. North Dakota, 236 U.S. 585, 593, 59 L. ed. 735, 740, L.R.A. 1917F, 1148, P.U.R. 1915C, 277, 35 S. Ct. 425, Ann. Cas. 1916A, 1; Union P. R. Co. v. Public Serv. Commission, 248 U.S. 67, 69, 63 L. ed. 131, 132, P.U.R. 1919B, 315, 39 S. Ct. 24; Merchants' Nat. Bank v. Richmond, 256 U.S. 635, 638, 65 L. ed. 1135, 1137, 41 S. Ct. 619; First Nat. Bank v. Hartford, 273 U.S. 548, 552. 553, 71 L. ed. 767, 770, 771, 59 A.L.R. 1, 47 S. Ct. 462; Fiske v. Kansas, 274 U.S. 380, 385, 386, 71 L. ed. 1108, 1110, 1111, 47 S. Ct. 655."

All the facts of record show that this was a Louisiana contract. The decision of the Mississippi Court, here ap-

pealed from, failed to give any faith and credit to the laws of Louisiana and went on to impair and to nullify that Louisiana contract, taking from this Appellant a debt which was truly to him owing. We are not here confronted with a case where a state court refused, on grounds of its public policy, to enforce a contract made elsewhere but we here have a case where the state court *at the instance of a third party to the deal*, affirmatively struck down a Louisiana contract based upon the application thereto of a Mississippi statute.

That this appeal should be entertained and dealt with upon the merits thereof is

Respectfully submitted,

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